

Rule 5, Ariz. R. Crim. P.

PRELIMINARY HEARINGS – Defendant's right to cross-examine witnesses at preliminary hearing is restricted.....Revised 12/2009

In most preliminary hearings, the State presents a limited number of witnesses (usually police officers). While the defendant may cross-examine the State's witnesses at a preliminary hearing, the defendant is restricted in the scope and type of cross-examination. *State v. Clark*, 126 Ariz. 428, 616 P.2d 888 (1980). In *Clark*, the Court ruled that the scope of cross-examination at a preliminary hearing is limited to those issues directly related to the determination of probable cause. *Id.* at 432, 616 P.2d at 892; see also *State v. Galvan*, 108 Ariz. 212, 214, 495 P.2d 442, 444 (1972) [magistrate may properly limit defendant's cross-examination to matters within the bounds of probable cause]. A defendant's opportunity to cross-examine witnesses at a preliminary hearing is only a limited one. See *State v. Williams*, 27 Ariz.App. 279, 283, 554 P.2d 646, 650 (1976). The United States Supreme Court expressly recognized the limited use of the preliminary hearing for impeachment purposes in *Adams v. Illinois*, 405 U.S. 278, 281-282 (1972). See *State v. Canaday*, 117 Ariz. 572, 576, 574 P.2d 60, 64 (App. 1977).

Although the defendant's right to cross-examination at a preliminary hearing is limited, the defendant is not required to conduct his questioning in the dark. The defendant has the right to examine police reports used by testifying officers to refresh their memory before cross-examining the officers. *State ex rel.*

Berger v. Justice Court, 112 Ariz. 24, 536 P.2d 1042 (1975). As the Court noted in *Berger*, although a defendant's right to discovery of pre-testimonial evidence before a preliminary hearing is limited, police reports used to refresh the memories of testifying officers must be disclosed to the defense before the officers may testify. *Id.* at 25, 536 P.2d at 1043. The *Berger* Court relied on *State v. Green*, 103 Ariz. 211, 212, 439 P.2d 483, 484 (1968), in which the Supreme Court found reversible the defendant's motion to see the police report, in order to cross examine the victim, was denied. See also *Zarate v. Jennings*, 17 Ariz. App. 401, 406, 498 P.2d 475, 480 (1972) [where the Court of Appeals found that a magistrate erred by denying a defendant access to a report from which a police officer refreshed his memory].